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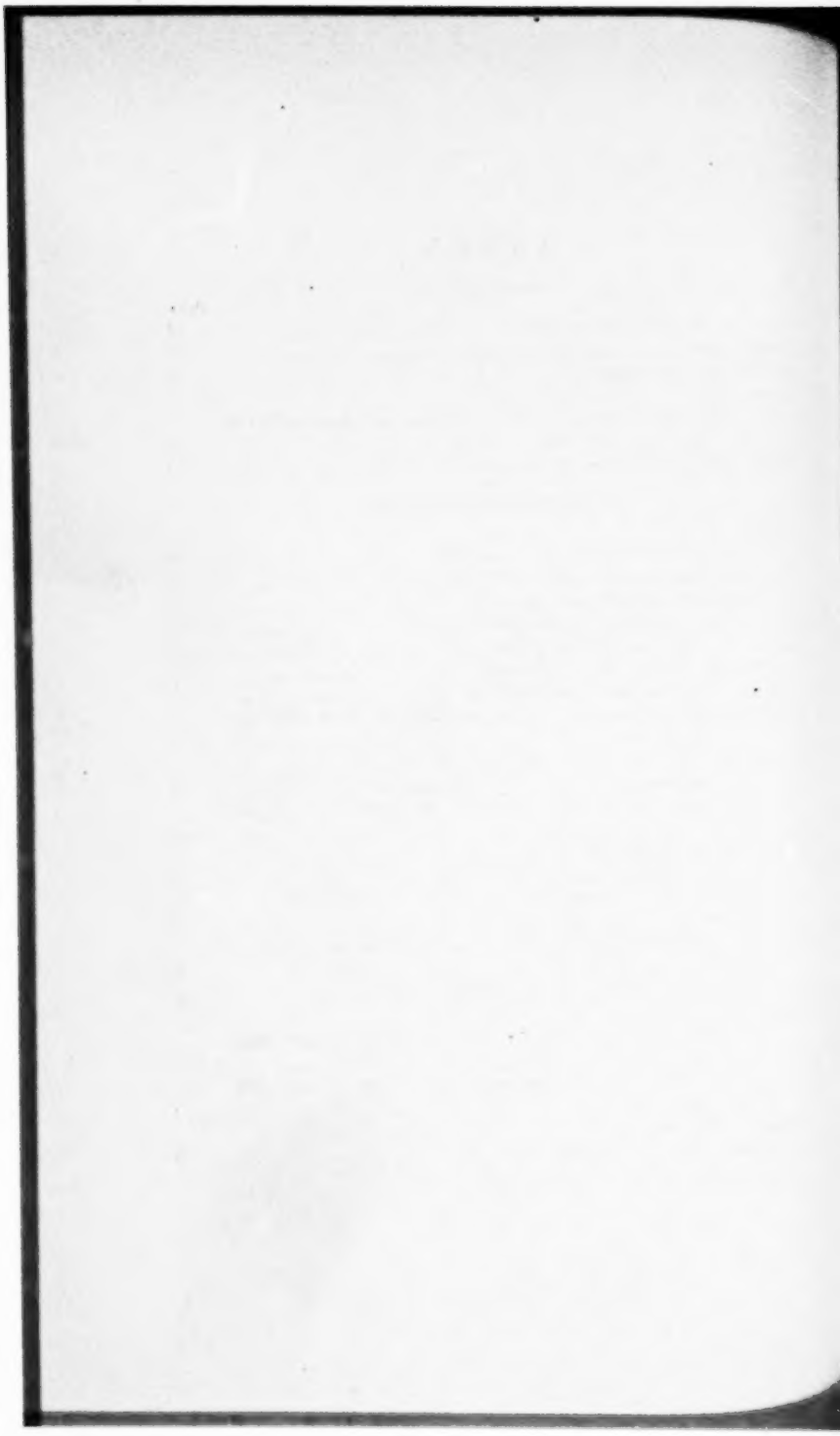

In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 653

ELIZABETH F. SHUKERT AND ISABEL C. SHUKERT, EXECUTRICES OF THE ESTATE OF GUSTAVE E. SHUKERT, DECEASED, PETITIONERS

v.

ARTHUR B. ALLEN, COLLECTOR OF INTERNAL REVENUE

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS OF THE LOWER COURTS

The opinion of the United States District Court for the District of Nebraska will be found reported in 300 Federal 754. The opinion of the Circuit Court of Appeals for the Eighth Circuit has not yet appeared in the Federal Reporter. It will be found, however, at page 188 of the transcript of record.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Eighth Circuit was entered May 15, 1925. Petitioners have set forth in their brief (pp. 8, 9, 10, 15) the authorities under which they apply to this Court for writ of certiorari.

STATEMENT OF THE CASE

One Gustave E. Shukert died testate on October 29, 1921, at Omaha, Nebraska (R. 1). Shortly prior to May 5, 1921, he sold a piece of real estate which he then owned, for the sum of $225,000. Of the purchase price, $35,000 was paid in cash; the balance of $190,000 was secured by mortgage and was evidenced by ten notes payable, respectively, in 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10 years, each for $5,000, and one for $140,000, payable in 30 years (R. 9, 10).

On May 5, 1921, after negotiations, Shukert transferred the proceeds of this sale to the United States Trust Company in trust for the following purposes:

> 1. The income from this Trust Fund shall be allowed to accumulate and be reinvested in order to increase the principal thereof, provided, however, that in case of extreme destitution and lack of the necessities of life by the wife of the Founder or of any of the beneficiaries hereinafter named, such person or persons may be allowed from the income of this Trust Fund a sufficient sum to pay for the bare necessities of life, such sum in no event to exceed Two Hundred and Fifty

($250.00) Dollars in any one month and for that month only, and in any event no such payment shall be made without written consent thereto first having been given by the wife of the Founder if living, and a majority of the adult beneficiaries; provided, in the event of a tie between those giving, and those failing or refusing to give such written consent, the Trustee, subject to the foregoing limitations as to necessity, amount and time, may act according to its discretion. Any and all such sums paid in this manner to any of the beneficiaries hereinafter named shall constitute a charge upon and shall be deducted from their share, or the share they would have taken if living, of the Trust Fund at its termination.

2. This Trust shall terminate on the first day of February, 1951, unless the death of the last survivor of the beneficiaries hereinafter named shall have occurred more than twenty-one (21) years prior to February First, 1951, in which case it shall terminate twenty-one (21) years from and after the death of the last survivor aforesaid. At the termination of this Trust all of the principal and undistributed income shall be paid to and divided among Isabel C. Shukert, Gustave Emil Shukert, Jr., and Flora G. Shukert, the children of the Founder, share and share alike. In the event that any of the above-named children of the Founder shall die leaving issue before the termination of this Trust then the share in said Trust Fund of the one so dying shall go to such

> issue, if one the whole, if more than one then in equal shares, provided, however, that such issues shall have attained the age of twenty-one (21) years. In case they have not attained this age, then their share is to be held in trust for their use and benefit until they shall have attained the age of twenty-one (21) years. In case any of the above-named beneficiaries shall die without issue before the termination of this Trust, then the share he or she would have taken if living shall be divided among the surviving beneficiaries per stirpes and not per capita. (R. 29.)

The trust instrument is set out in full as Plaintiffs' Exhibit No. 1, at page 28 of the record.

At the time this trust was created, and shortly prior thereto, Shukert stated that he intended the trust to terminate and the corpus and accumulated income to be distributed to the beneficiaries after he had died (R. 48, 49, 57, 58, 78, 163, 164, 167).

After Shukert's death the executors filed a return for the purpose of Federal estate taxes under the provisions of the Revenue Act of 1918 (40 Stat. 1057, Ch. 18). They did not include in the gross estate the value of the securities transferred to the trustees (R. 85). Upon investigation and reaudit the Commissioner of Internal Revenue determined that this value was a part of the gross estate, because the transfer and trust was within the provisions of Section 402 (c) of the Revenue Act of 1918, *supra*, which provides:

SEC. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act), except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title.

This addition to the gross estate resulted in an additional tax amounting to $13,685.47, which was paid under protest and this suit brought for its recovery. The District Court gave judgment for the respondent (R. 19), and upon writ of error (R. 22, 23) the Circuit Court of Appeals for the Eighth Circuit affirmed the judgment (R. 192).

Petitioners now seek a further review by certiorari from this Court.

GROUNDS FOR THE WRIT

Petitioners seek the writ in substance upon the ground that the court erred in holding that the transfer and trust was, within the meaning of Section 402 (c) of the Revenue Act of 1918, "intended to take effect in possession or enjoyment at or after" decedent's death.

ARGUMENT

I

The rulings of the lower courts are in accord with the law and decisions

Decedent's purpose in deferring the distribution of the trust property for thirty years is perfectly obvious. It was to prevent the beneficiaries from coming into the possession or enjoyment thereof until after his death. He expressly so declared (R. 163, 164). Therefore, since Section 402 (c) by its terms makes the propriety of the inclusion of such property in the measure of the tax dependent upon the intention of the donor, it is manifest that the value of the trust property involved in the instant case was properly included. As stated in *Conway's Estate* v. *State,* 120 N. E. 717 (p. 719), the rule is:

> If the facts and circumstances shown by the evidence, in connection with the conveyances and the reservation of full possession by the grantor to the date named in the deeds, reasonably authorize the inference that in fixing such date the grantor contem-

> plated that his death would occur on or before the date so named in such reservation, it would follow that the transfers were made to take effect at or after the death of the grantor within the meaning of the statute.

There can be no question that the purpose of Section 402 (c) is to prevent property which has been disposed of by a quasi-testamentary transfer from escaping taxation and to make the law equally applicable to all decedents who make benefactions which are intended to confer no benefit upon the donees until after the death of the donors. Such has been the construction placed upon similar State statutes. *State Street Trust Company* v. *Treasurer,* 209 Mass. 373; *People* v. *Danks,* 289 Ill. 542; *Cole* v. *Nickel,* 43 Nev. 12; *State* v. *Pabst,* 139 Wis. 561.

That this is also the proper construction of the Federal Estate Tax Act is clearly indicated by the fact that the very section of that Act here under consideration couples both gifts in contemplation of death and gifts intended to take effect in possession or enjoyment at or after death.

That which differentiates an outright gift *inter vivos* which is not taxable from a quasi-testamentary gift, which is taxable, has been held to be not so much the form or succession of the donor's interest or title as the intention, purpose, and motive which prompts the gift. Intent is the sole criterion. If the gift was intended to benefit the

donee after the donor's death, as in this case, it is obviously similar in purpose and in effect to a testamentary disposition. *State Street Trust Company* v. *Treasurer, supra; In re Patterson's Estate,* 146 N. Y. App. Div. 286, aff. 204 N. Y. 677; *People* v. *Moir,* 207 Ill. 180; *In re Felton's Estate,* 176 Cal. 663.

The fact that the title to the property and the right to future enjoyment vest prior to death is immaterial. *Carter* v. *Bugbee,* 92 N. J. Law 390; *Re Cruger,* 54 N. Y. App. Div. 405, aff. 166 N. Y. 602; *Waugh's Appeal,* 78 Pa. 436; *People* v. *Kelley,* 218 Ill. 509; *Chambers* v. *Lamb,* 186 Cal. 261.

Moreover, as the court below pointed out, the interest of the beneficiaries involved in the instant case is not absolute, but is defeasible. *Wright* v. *Blakeslee,* 101 U. S. 174.

So far as this principle is concerned the present case is similar to that of *Keeney* v. *Comptroller,* 222 U. S. 525, the only distinction being that in the *Keeney case* a life interest was reserved to the donor, whereas in the instant case no interest is reserved. This difference is wholly immaterial, however, for the statute clearly looks, not to the interest which the donor reserves, but to the interest which he gives away. Otherwise, gifts in *contemplation* of death would not be included. The authorities quite generally hold that failure to reserve an interest does not indicate that the gift was not within the intent of the law. *New England Trust Company* v. *Abbott,* 205 Mass. 279;

State Street Trust Company v. *Treasurer*, 209 Mass. 373; *Re Patterson's Estate*, 146 N. Y., App. Div. 286, aff. 204 N. Y. 677; *Re Cruger*, 54 N. Y. App. Div. 405, aff. 166 N. Y. 602.

It will be observed that the construction by the State courts is the same in those States where the tax is imposed upon the right to transmit, as in New York (See *Home Trust Company* v. *Law*, 204 N. Y. App. Div. 590, aff. 236 N. Y. 607), as it is in those States where the tax is upon the right to receive, as in Massachusetts.

Furthermore, in construing Section 402 (c) it is to be noted that substantially the same language was contained in Section 202 (b) of the Revenue Act of 1916 (39 Stat. 756, Ch. 463). Prior to the passage of the 1918 Act this section in the 1916 Act had been construed by the Treasury Department as embracing such trusts as the one here involved. See Regulations 37, Article 24. In reenacting this previous provision in a later act without substantial change it must be deemed that Congress adopted that construction.

For the foregoing reasons, it is submitted that the rulings of the lower courts are correct.

II

There is no need for the issuance of the writ

The intent of the law is plain and no conflict of opinions in its interpretation is involved. The question, while important, perhaps, to petitioners,

is not of such general public importance as would bring it within the rules heretofore laid down by this Court for the issuance of writs of certiorari. *Fields* v. *United States,* 205 U. S. 292.

Therefore the petition should be denied.

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AUGUST, 1925.

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